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'Duplex and reciprocal' obligation: *Calvin's Case* (1608) and the development of early modern English citizenship*

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ABSTRACT

Whether or not people in early modern England were citizens has often been analysed in terms of individuals' participation in self-rule, neglecting the fact that citizenship is also a legal status. Citizenship as a legal status comprises rights, conferred through belonging to a polity, and enacted through participation. This article seeks to understand the extent to which the legal status of early modern English subjects was citizenlike through examining Calvin's Case (1608) and its afterlife. The judgement in Calvin's Case drew on established legal principles to construct a legal status for English subjects, wherein natural allegiance to the monarch conferred protection. This remains the basis of British citizenship today. The judgement itself was ambiguous, defining protection both as natural protection emanating from the monarch and legal protection, that is, rights enshrined in law. The use of the judgement in the debates of the 1640s and 1680s about subjects' capacities to resist perceived monarchical overreach sheds important light on how English individuals understood their rights, the relationship of these rights to belonging and the limits of enacting these rights through participation.

Citizenship in early modern England has been discerned in office-holding,[1] the local citizenship of the chartered borough[2] and in texts, often referencing classical thought.[3] In these studies, citizenship is often understood as individual freedom and/or participation in government. Citizenship, however, is a multivalent concept, and early modern citizenship can take other forms. As J. G. A. Pocock has argued, citizenship in practice and conceptually can be divided into two models: the 'Greek' model, whereby citizenship is understood as active participation in self-rule or the 'Roman' model of a legal status conferring rights on individuals.[4]

This article seeks to reconsider English citizenship in early modernity as a meaningful legal status, that is, Pocock's 'Roman' model, through examining *Calvin's Case* (1608) and its afterlife in political debates

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1 M. Goldie, 'The Unacknowledged Republic', in *The Politics of the Excluded c.1500-1850*, ed. T. Harris (Basingstoke, 2001), pp. 153–94.

2 M. Prak, *Citizens Without Nations: Urban Citizenship in Europe and the World, c.1000–1789* (Cambridge, 2018), *passim*; P. Withington, *The Politics of the Commonwealth: Citizens and Freemen in Early Modern England* (Cambridge, 2005), *passim*.

3 M. Peltonen, *Classical Humanism and Republicanism in English Political Thought, 1570–1640* (Cambridge, 1995), pp. 12–15.

4 J. G. A. Pocock, 'The ideal of citizenship since classical times', in *The Citizenship Debates: a Reader*, ed. G. Shafir (Minneapolis, 1998), pp. 31–41. See also P. Reisenberg, *Citizenship in the Western Tradition: Plato to Rousseau* (Chapel Hill, 1992), pp. xvi–iii; R. K. Balot, 'Revisiting the classical ideal of citizenship', in *The Oxford Handbook of Citizenship*, ed. A. Shachar and others (Oxford, 2017), pp. 26–46.

in the 1640s and 1680s. The case established in law the status of English subjects through outlining a relationship between subject and sovereign as one of natural allegiance and legal protection. This article seeks to address the extent to which this status constituted citizenship, or a citizenlike status, and how it was used, challenged or dismissed in these tumultuous decades. However, with the exception of the work of David Martin Jones,[5] *Calvin's Case* rarely features in histories of the 1640s or the 1680s. Studies of changing allegiances in these decades often presuppose a free choice on the part of English subjects between parliament, king or neutrality, sometimes expressed through oath-taking.[6] At the same time, studies of citizenship in early modern England often focus on natural rights or 'neo-Roman' discourses of rights that emerged in the 1640s and 1650s, rather than finding for a pre-existing citizenship or a citizenlike status in common law.[7] Although the afterlife of *Calvin's Case* in America as the basis for citizenship has been an object of considerable scholarly attention,[8] the longer term impact of the case in England is rarely addressed, with the exception of Martin Jones' work on oath-taking at the accession of William and Mary.[9] Rather, the case is understood in terms of its implications for Anglo-Scottish union.[10]

Calvin's Case concerned the naturalization of James I's Scottish subjects in England. As Liav Orgad has argued, naturalization, a process only experienced by the migrant entering the space of citizenship or subjecthood, lays bare the often opaque components of the contract between citizen and state.[11] Examining *Calvin's Case* and its interpretations in the 1640s and 1680s helps us to clarify how at least some English subjects understood their legal status, and the extent to which it was, or was not, citizenlike. It also enables us to understand more clearly how the legal status of individual English subjects was used in wider debates about the most appropriate forms of government in seventeenth-century England. Although a citizenlike status is of course not the only element that enabled English people to resist or support different forms of government, it is an important and hitherto neglected one.

Before turning to *Calvin's Case* and its afterlife, we must first understand what is meant by citizenship, particularly citizenship as a legal status. With the exception of Maarten Prak and David Harris Sacks, historians of early modern citizenship have tended not to engage with theories of citizenship.[12] These theories, however, developed by legal and sociological scholars, highlight the contested and dynamic nature of citizenship as a concept and as a practice. We can think of citizenship in three senses: participatory, in terms of direct involvement in the state; representative, in that citizens have the right to vote and so on; and as a legal status.

One of the stumbling blocks to considering early modern legal citizenship as a meaningful status is its perceived modernity: Hannah Arendt's formulation that citizenship confers the 'right to have rights' can be understood to imply that citizenship as a legal status only exists in a nation-state system.[13] However, thinking in this way suggests a teleology of modern citizenship as stable and somehow

[5] D. M. Jones, *Conscience and Allegiance in Seventeenth Century England: The Political Significance of Oaths and Engagements* (Rochester, N.Y., 1999), pp. 146–62, 201–22; D. M. Jones, 'Sir Edward Coke and the interpretation of lawful allegiance in seventeenth-century England', *History of Political Thought*, vii (1986), 321–40.

[6] J. Morrill, 'The ecology of allegiance in the English civil wars', in *The Nature of the English Revolution: Essays by John Morrill*, ed. J. Morrill (Harlow, 1993), pp. 177–242; D. Underdown, *Revel, Riot, and Rebellion* (Oxford, 1997), pp. 1–9, 162–82, 183–206; D. Cressy, *England on Edge: Crisis and Revolution 1640-1642* (Oxford, 2006), pp. 320–30, 348–52; M. Braddick, 'Mobilisation, anxiety and creativity in England during the 1640s', in *Liberty, Authority, Formality: Political Ideas and Culture 1600–1900*, ed. M. Morrow and J. Scott (Exeter, 2008), pp. 175–93; J. Eales, 'Provincial preaching and allegiance in the first English civil war, 1640–6', in *Politics, Religion and Popularity in Early Stuart Britain: Essays in Honour of Conrad Russell*, ed. T. Cogswell and others (Cambridge, 2002), pp. 185–207.

[7] R. Tuck, *Natural Rights Theories; Their Origins and Development* (Cambridge, 1979), pp. 143–53; Q. Skinner, 'Rethinking political liberty', *History Workshop Journal*, lxi (2006), 156–70; J. Sanderson, *'But the People's Creatures': The Philosophical Basis of the English Civil War* (Manchester, 1989), pp. 10–33; A. Brett, 'Protection as a political concept in English political thought, 1603–51', in *Protection and Empire: A Global History*, ed. L. Benton and others (Cambridge, 2017), pp. 93–113.

[8] P. J. Price, 'Natural law and birthright citizenship in Calvin's Case (1608)', *Yale Journal of Law and the Humanities*, lxxiii (1997), 73–145; E. Cavanagh, 'Infidels in English legal thought: conquest, commerce and slavery in the common law from Coke to Mansfield, 1603–1793', *Modern Intellectual History*, xvi (2019), 375–409; D. Hulsebosch, 'The ancient constitution and the expanding empire: Sir Edward Coke's British jurisprudence', *Law and History Review*, xxi (2003), 439–82; D. Grant, 'Sir Edward Coke's infidel: imperial anxiety and the colonial origins of a "Strange Extrajudicial Opinion"', *The Journal of Modern History*, xcv (2023), 771–807.

[9] M. Jones, *Conscience and Allegiance in Seventeenth Century England*, pp. 201–22; M. Jones, 'Sir Edward Coke and the interpretation of lawful allegiance in seventeenth-century England', *History of Political Thought*, vii (1986), 321–40.

[10] B. R. Galloway, *The Union of England and Scotland: 1603–1608* (Edinburgh, 1986); R. Kanemura, 'Kingship by descent or kingship by election? The contested title of James VI and I', *Journal of British Studies*, lii (2013), 317–42.

[11] L. Orgad, 'Naturalization', in *The Oxford Handbook of Citizenship*, pp. 348–70.

[12] Prak, *Citizens without Nations*, pp. 24–7; D. Harris Sacks, 'Freedom to, freedom from, freedom of: urban life and political participation in early modern England', *Citizenship Studies*, xi (2007), 134–50, at pp. 136, 142–6.

[13] H. Arendt, *The Origins of Totalitarianism* (New York, 1968, repr. London, 2017), pp. 380–91.

complete, against which we can measure earlier forms. Although legal scholars and sociologists have shown citizenship is not stable, it is still useful as a category. There is broad agreement that citizenship can be understood as essentially comprising three elements: *rights*, contingent on *belonging* to a polity, which are exercised through *participation*.[14] That is not to say that there is any one set of 'citizenship rights'.[15] Rather, we can understand that citizenship 'rights regimes' differ over time and space: in the context of citizenship what is important is that belonging enables access to a rights regime. A rights regime, as defined by Samuel Moyn, is a system that enables individuals to conceptualize and access specific claims against a body.[16] Such rights must be accessible, in the sense that they are justifiable and understood within a society's discursive framework.[17] Rights regimes are not static; as Paul Patton has argued, it is implausible that any body of rights has always existed. It is more appropriate to conceptualize rights as a 'complex social practice' that shifts over time, reflecting changing societal norms.[18] As Charles Tilly, Anupama Roy and Linda Bosniak, and others have argued, a citizenship rights regime may not operate fairly or be accessible to all people at all times; however, it must be the way that individuals negotiate their relationships to the state(s) to which they belong, or wish to belong.[19] Belonging too can be constituted in a variety of ways: through place of birth (*ius soli*), through descent (*ius sanguinis*) or increasingly through a mixture of the two.[20] It can be acquired through naturalization. Participation can take many forms: representative democracy, yes, but also court cases to enforce the rights one holds, as well as protest, petitioning and so on.

It should be noted that the form of British, previously English, citizenship both in modernity and early modernity is particularly opaque.[21] Early modern English people were, legally, subjects. Some scholars, notably Ann Dummett and Andrew Nicols, have understood the status of the subject as one of total subjection, predicated by an individual's personal allegiance to the monarch.[22] However, to understand subject status as straightforwardly indicating subjection is an oversimplification. British citizens were legally subjects into the twentieth century, and elements of this status remain.[23] In 2007, Lord Goldsmith was asked to undertake a review of British citizenship law, which is illuminating for those wishing to understand pre-modern English or British citizenship. British citizens today hold that status because they are born in the allegiance of the monarch: being born in allegiance confers protection, which today we understand to be our rights. There is no constitution setting out what rights adhere to this status.[24] British citizenship rights today are a jumble of common law, statute and international law, particularly the Human Rights Act. There is also the question of participation. Polly J. Price, in her analysis of *Calvin's Case*, has argued that English subjects were not citizens due to their limited rights to political participation.[25] The focus on participation suggests a binary between the

[14] For a useful summary of this consensus, see, 'Introduction: what do we talk about when we talk about citizenship rights?', in *Citizenship Rights*, eds. J. Shaw and I. Štiks (Abingdon, 2013), pp. xi–xxv. See also K. Faulks, *Citizenship* (Oxford, 2000), p. 13; M. Vink, 'Comparing citizenship regimes', in *The Oxford Handbook of Citizenship*, eds. Shachar and others, pp. 235–58; S. Benhabib, 'Citizens, residents, and aliens in a changing world: political membership in the global era', *Social Research*, lxvi (1999), 709–44.

[15] C. Tilly, 'Citizenship, identity and social history', *International Review of Social History*, xl (1995), 1–17.

[16] S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass., 2010), pp. 17–37.

[17] P. Patton, 'History, normativity, and rights', in *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*, ed. C. Douzinas and C. Gearty (Cambridge, 2014), pp. 233–50, at pp. 237–8.

[18] Patton, 'History, normativity, and rights', pp. 233–50.

[19] Tilly, 'Citizenship, identity and social history', pp. 1–17; A. Roy, *Mapping Citizenship in India* (Delhi, 2010), pp. 4–5, 10–2; K. Sadiq, 'Limits of legal citizenship: narratives from South and Southeast Asia', in *Citizenship in Question: Evidentiary Birthright and Statelessness*, ed. B. N. Lawrance and J. Stevens (Durham, N.C., 2017), pp. 165–76; L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, N.J., 2006), pp. 26–7.

[20] G. de Groot and O. Vonk, 'Acquisition of nationality by birth on a particular territory or establishment of parentage: global trends regarding Ius Sanguinis and Ius Soli', *Netherlands International Law Review*, lxv (2018), 319–35.

[21] J. Shaw, 'Citizenship and the franchise', in *The Oxford Handbook of Citizenship*, pp. 301–25; see also C. Sawyer and H. Wray, *Report on United Kingdom: Revised and Updated in December 2014* (Florence, 2014) <https://hdl.handle.net/1814/33839> [accessed 3 Feb. 2024].

[22] A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Evanston, 1990), pp. 22–31, 60–3. See also Faulks, *Citizenship*, pp. 3–5.

[23] J. W. Salmond, 'Citizenship and allegiance', *Law Quarterly Review*, xviii (1902), 49–63; D. Prabhat, 'Unequal citizenship and subjecthood: a rose by any other name...?', *Northern Ireland Legal Quarterly*, lxxi (2020), 175–91; Dummett and Nicol, *Subjects, Citizens, Aliens and Others*, pp. 60–3.

[24] Lord Goldsmith QC, *Citizenship: Our Common Bond* (London, 2007); R. G. Holme, Baron Holme of Cheltenham, 'Citizenship and the British Constitution', *RSA Journal*, cxl (1992), 433–42; T. Jacob-Owens, 'British citizenship as a non-constitutional status: the UK Supreme Court ruling in PRCBC', *Verfassungsblog* (February 2022) <https://verfassungsblog.de/uk-citizenship-fundamental/> [accessed 10 Mar. 2024].

[25] Price, 'Natural law and birthright citizenship in Calvin's Case (1608)', pp. 87–9.

'active citizen' and 'passive subject', dependent on the will of their sovereign.[26] However, as Conal Condren has noted, the concepts of 'subject' and 'citizen' in early modern England were slippery: the 'citizen' sometimes experienced subjugation, and the 'subject' sometimes behaved in a citizenlike way.[27] Moreover, Martin Loughlin and Richard Tuck, among others, have noted that the direct involvement in the government of modern British citizens is limited, due to the pre-eminence of parliament.[28]

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It was in fact *Calvin's Case* that established in law that birth in allegiance confers protection.[29] Allegiance to the monarch as the form of belonging is straightforward enough: one is either born in, or out, of allegiance and therefore does, or does not, belong. Protection, its form and its relationship to allegiance are more complex. If allegiance is to the monarch, is the form of protection whatever they might decide? In that case, it would be hard to argue that English subjects held a citizenlike status, if subjects' protection could vary depending on the whim of the monarch. However, protection could also mean a commitment by the monarch to protect the rights that their subjects might hold. There is a tension here, one that is exacerbated when the nexus between allegiance and protection breaks down: what remedy might subjects have if they feel the monarch is not adequately providing protection, including through upholding their rights?

Prior to *Calvin's Case*, and important in the judges' conclusions, was a corpus of common law texts that had established that English subjects held specific rights: by the end of the sixteenth century, Chapter 29 Magna Carta had become a shorthand of a kind, specifying rights to life, property and fair access to the law.[30] As Edward Coke noted in an unpublished 1604 memorandum on this chapter, a subject had access to these rights through 'the benefit of the law to which he is inheritable, or his native country in which he was born'.[31] This citizenlike status does not negate the other forms of early modern citizenship, but nor does local citizenship of a chartered borough render national citizenship weaker, just as someone today could hold multiple citizenships. In cases such as *Davenant v. Hurdes* (1599),[32] *Darcy v. Allen* (1602)[33] and *Whetherley v. Whetherley* (1605),[34] however, subjects' rights as members of an English community were asserted, or upheld, against prerogative or the liberties or privileges of chartered boroughs or guilds. Moreover, as John Baker has argued, judges understood prerogative to be substantially limited.[35] Arguments and judgements in these cases suggest a citizenlike status, in which rights adhering to individuals supersede monarchical prerogative or local regimes.[36] At the same time, sixteenth-century legal texts suggested that the coronation oath was the guarantee that protected rights: the monarch promised to rule according to law and therefore protect rights, which were contained in, and enforceable in, that domain.[37] Such texts, however, had remained silent on what ought to be done if the relationship between allegiance and protection broke down.

[26] C. Condren, *The Language of Politics in Seventeenth-Century England* (Basingstoke, 1994), pp. 92–3.
[27] Condren, *The Language of Politics*, pp. 91–114.
[28] M. Loughlin, 'Constituent power subverted: from English constitutional argument to British constitutional practice', in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. M. Loughlin and N. Walker (Oxford, 2008), pp. 27–48; R. Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge, 2016), pp. 250–1.
[29] Lord Goldsmith QC, *Citizenship: Our Common Bond*, pp. 40–1; see also G. L. Williams, 'The correlation of allegiance and protection', *The Cambridge Law Journal*, x (1948), 54–76 [pp. 55–6].
[30] J. Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge, 2017), pp. 140–50; M. Radin, 'The myth of Magna Carta', *Harvard Law Review*, lx (1947), 1060–91, at pp. 1077–8.
[31] Edward Coke, 'Coke's memorandum on chapter 29 (1604)', in Baker, *The Reinvention of Magna Carta 1216–1616*, pp. 500–10.
[32] Edward Coke, *The Second Part of the Institutes of the Lawes of England Containing the Exposition of Many Ancient, and Other Statutes: Whereof You May See the Particulars in a Table Following/Authore Edw. Coke* (London, 1642), p. 47.
[33] Edward Coke, *The Eleventh Part of the Reports of Sir Edward Coke Kt.* (London, 1738), fol. 84v–88v; C. W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008), pp. 399–400.
[34] 'Whetherley vs Whetherley' in Baker, *The Reinvention of Magna Carta 1216–1616*, pp. 511–6.
[35] J. Baker, 'Human rights and the rule of law in renaissance England', in *Collected Papers on English Legal History*, ed. J. Baker (Cambridge, 2013), pp. 923–44, at pp. 928–9.
[36] J. Baker, 'Personal liberty under the common law 1200–1600', in *Collected Papers on English Legal History*, pp. 871–900 [p. 891]; Brooks, *Law, Politics and Society*, p. 399; Sacks, 'Freedom from, freedom to', pp. 140–1.
[37] John Rastell, *The Statutes Prohemium Iohannis Rastell* (London, 1527), fols. clxiir–clxiiv; C. St. Germain, *The Doctor and Student: Or, Dialogues Between a Doctor of Divinity and a Student in the Laws of England*, ed. W. Muchall (Cincinatti, 1874), fol. xii; William Lambarde, *Archeion, Or, A Discourse Vpon the High Courts of Iustice in England. Composed by William Lambard, of Lincolnes Inne, Gent* (London, 1635), pp. 260–61; James Morice, *A Briefe Treatise of Oathes Exacted by Ordinaries and Ecclesiasticall Iudges* (Middelburg, 1590), p. 49.

It is in this context that the courts attempted to resolve the question of Scottish naturalization in a case that also settled the status of English subjects in law. The case itself concerned whether Robert Calvin (or Colville), a Scottish subject of James I, born after James' accession to the English throne, had a right to inherit property in England. The case was heard before twelve judges, including the lord chancellor, Ellesmere and Sir Edward Coke, then chief justice of the common pleas. The importance of *Calvin's Case* and its implications for English subjects was recognized by the judges: as Sir Edward Coke put it in the judges' conference, 'It is magnum in parvo. a matter of great consequence uppon a slender subiect'.[38] The majority of the judges found for naturalization on the basis of Calvin's 'natural allegiance' to James. That is, he was born into an irrevocable form of allegiance not to the state but to the actual person of the monarch. It was this form of allegiance that conferred on Calvin the rights of English subjects when James ascended the English throne.

The fact that the case was heard at all indicates disagreement about the status of English subjects. James had first attempted to naturalize his Scottish subjects by proclamation; when this caused an uproar, he then turned to parliament, failing over four years to secure naturalization through statute. James then turned to the courts to secure judge-made law in this collusive action.[39] James and his allies had understood that naturalization was straightforward because of their understanding of allegiance and protection. As James said in 1604: 'as Honour and Priuiledges of any of the Kingdomes could not be diuided from their Soueraigne, So are they now confounded & ioyned in my Person, who am equall and alike kindly Head to you both'.[40] In this model, subjects owed allegiance to the monarch in their personal capacity, who offered protection and committed to upholding justice, and, sometimes, the laws themselves.[41] The monarch was meant to respect the law, but could not be forced to obey it. This means that the protection conferred by allegiance was not a rights-bearing status. If the monarch chose not to offer protection as defined by the law, or at all, there was no remedy; James specifically declined to view the coronation oath as a contract.[42]

The opposition to Scottish naturalization was more diffuse, reflecting some of the lacunae of the sixteenth-century legal treatises. Broadly speaking, opponents argued that allegiance was to the monarch, but its form was determined by the laws. The Commissioners for Union in 1604 hinted at this complexity, stating that the naturalization of Scottish subjects in England and vice versa would be constituted not just through allegiance to the monarch, but in accordance with the 'Comon Lawes of both the Kingdomes'.[43] As England and Scotland had different laws, it was not possible simply to translate shared allegiance to a monarch to meaningful legal belonging in each country: as the M.P. William Holt argued in 1607 'Common Law limited to the Compass of this Land, and only by the Benefit of that Law naturalized'.[44] Some suggested that allegiance itself was limited, not just determined, by law: Sir Richard Spencer argued that, 'Sovereignty hath a Relation to Subjection…Where the Sovereignty is tied to the Laws, there must the Subject be guided by those Laws, and no other'.[45]

Most seventeenth-century actors, and modern historians, with the exception of Daragh Grant and B. R. Galloway, rely substantially on Sir Edward Coke's account of *Calvin's Case* in his *Seventh Report*.[46] The account in Coke's *Report* is long, complex and surprisingly ambiguous. Coke certainly stretched himself in finding the basis for natural allegiance in common law and statute: it was important to him

[38] The National Archives of the U.K., SP 14/34, fol. 19v.

[39] J. S. Hart, *The Rule of Law 1603–1660: Crowns, Courts, and Judges* (Harlow, 2003), p. 87; Brooks, *Law, Politics, and Society*, p. 145.

[40] James VI and I, 'A speach, as it was delivered in the vpper hovse of the parliament to the lords spiritvall and temporall, and to the knights, citizens and burgesses there assembled, on Mvnday the Xix. day of March 1603. Being the first day of the first parliament', in *King James VI and I Political Writings*, ed. J. P. Sommerville (Cambridge, 2004), pp. 133–46.

[41] James VI and I, 'The trew law of free monarchies or the reciprock and Mvtvall Dvetie betwixt a free king and his naturall subjects' in *King James VI and I Political Writings*, pp. 62–84, at pp. 64–5, 74–5.

[42] James VI and I, 'The trew law of free monarchies', p. 81.

[43] T.N.A., SP 14/10B, fol. 79.

[44] 'House of Commons Journal Volume 1: 19 February 1607 (2nd scribe)' *Commons Journal*, i. 337–8.

[45] 'House of Commons Journal Volume 1: 20 February 1607 (2nd scribe)', *Commons Journal*, i. 338–9.

[46] The account in T. B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783, Vol. II 1 James I to 3 Charles I 1603–27* (Hansard, 1816), pp. 559–698, which includes Francis Bacon's speech but is substantially based on Coke's *Report* is used in Kanemura, 'Kingship by descent or kingship by election?', pp. 336–9; D. M. Jones, 'Sir Edward Coke and the interpretation of lawful allegiance in seventeenth-century England', pp. 325–31; Hart, *Rule of Law,*

that a case 'concerning the freehold and Inheritance in England, is only to be decided by the Laws of this Realm'.[47] Coke argued that such a finding was possible, as common law was analogous to natural law, and bolstered his account by extrapolating a form of 'natural' allegiance from principles of feudal homage found in key English authorities such as Glanvill,[48] Bracton,[49] St. Germain[50] Fleta,[51] Plowden[52] and Littleton[53] as well as statute and case law. Coke argued at length that descriptions of subjects as 'liege' in statutes indicated natural allegiance, 'whereby subjects are called his Liege Subjects, because they are bound to obey and serve him'.[54] Natural allegiance, founded in natural law, was absolute, pure and indefinite.[55] It was acquired at birth in the domains of the king. It was not the only form of allegiance, however: allegiance might be acquired through, for example, naturalization, or local, as in the temporary protection of a migrant under a monarch. Legal allegiance was the form of allegiance expressed in oaths of allegiance.[56] However, these forms were all subordinate to natural allegiance.

Coke explicitly stated that the coronation oath, like the legal allegiance of subjects, was in no way a pact between subject and sovereign.[57] Therefore, there was no guarantee of the protection of specific rights. Allegiance was owed to the natural, not political, body of the king in part because the political body cannot take homage. However, both capacities exist and are inseparable: the political body is 'framed by the Policy of Man' and is the domain wherein kingship resides.[58] Coke emphasized this by arguing that treason was against the natural body: he used the example of the Despensers who had 'invented this damnable and damned Opinion' that as allegiance was to the political body of the king, it was possible, even desirable, to break this allegiance in the event of unlawful actions on the part of the monarch.[59] The notion, then, that remedies were available through lawful revolt against the person, but not the office, of the king was here foreclosed.

Altogether this suggests a form of protection that was at the monarch's discretion. However, Coke also insisted, in a phrase that would be frequently scrutinized, that allegiance was 'duplex and reciprocal'.[60] Coke further muddied the waters when he turned to the form of protection. He suggested that natural allegiance conferred an expanded protection consisting of two distinct elements: the legal rights adhering to English subjects, developed and maintained through parliament and the courts, and a broader form of 'natural' protection solely defined by the monarch.[61] This then suggests a rights-bearing status that is in contradistinction to an expansive natural allegiance.

The judges tended to agree that allegiance generated protection, often phrased in terms of legal rights: Ellesmere for example noted that Calvin 'ought by Reason and Law to have all the freedomes, priviledges, and benefites pertaining to his birthright in all the Kinges Dominions'.[62] However, there was significant diversity of opinion among the judges about rights, belonging and their interrelationship, as shown in a contemporaneous note taken for the privy council. Francis Bacon, then attorney general, argued for Calvin on the basis of his natural allegiance to James. Richard Hutton, the lawyer engaged

pp. 86–9; and Cavanagh, 'Infidels in English legal thought', pp. 381–5. Cavanagh also uses Coke's report in Edward Coke, *The Selected Writings of Sir Edward Coke, Vol I*, ed. S. Sheppard (Indianapolis, 2003). K. Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, 2000) uses *State Trials* and Coke's *Report*, pp. 176–87, as does Price, 'Natural law and birthright citizenship in Calvin's Case (1608)', pp. 80–121. H. W. Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford, 2017), pp. 17–30 relies on Coke's *Report*. See also S. DeGooyer, *Before Borders: A Legal and Literary History of Naturalization* (Baltimore, 2022), pp. 40–1; Galloway, *The Union of England and Scotland: 1603–1608,* cites the Privy Council note p. 154; Grant, 'Sir Edward Coke's infidel: imperial anxiety and the colonial origins of a "Strange Extrajudicial Opinion"' has the largest array of sources relating to the judgement, including the Privy Council note, pp. 781–97.

47 E. Coke, *The Seventh Part of the Reports of Sir Edward Coke, Kt, Chief Justice of the Common Pleas* (London, 1738), fol. 4r.
48 Coke, *Seventh Report*, fol. 4v.
49 Coke, *Seventh Report*, fols. 10r, 13v, 16v, 25v.
50 Coke, *Seventh Report*, fol. 13v.
51 Coke, *Seventh Report*, fol. 25v.
52 Coke, *Seventh Report*, fol. 11r.
53 Coke, *Seventh Report*, fol. 11r.
54 Coke, *Seventh Report*, fol. 5r.
55 Coke, *Seventh Report*, fol. 5v.
56 Coke, *Seventh Report*, fol. 5v.
57 Coke, *Seventh Report*, fols. 10r–12r.
58 Coke, *Seventh Report*, fol. 10r.
59 Coke, *Seventh Report*, fols. 11r–v.
60 Coke, *Seventh Report*, fol. 5r.
61 Coke, *Seventh Report*, fols. 13r–14v.
62 Thomas Egerton, 'The speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the post-Natf' (1608)', in *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere*, ed. L. A. Knafla (Cambridge, 1977), pp. 202–53, at p. 247.

to argue against Calvin, echoed the views of some M.P.s opposing naturalization when he stated that allegiance is to the 'crown, not the person of a k[ing]'.[63] Most judges found straightforwardly for natural allegiance, although Chief Justice Fleming emphasized the ways in which monarchical power had to operate within the law.[64] However, Sir Thomas Foster, a common law judge, rejected natural allegiance, arguing that as each kingdom was separate, it was not possible to extend English rights to Scots in England. This was due to the limitations placed on monarchical power by the law. Although subjects do have allegiance to the monarch, the monarch is restrained by the law in conferring rights: 'The law is lex coronae, lex terrae, not lex Regis. There is liegiance of the subiect to the k[ing] and of the k[ing] to the kingdome and to the lawes proved by his oth at his coronation'.[65] Thomas Walmsley also dissented, arguing that as king of England and Scotland, the king did in fact have two political bodies, and therefore allegiance was owed separately in each country.[66] Moreover, Walmsley noted that there were different concepts of allegiance under Scottish and English law, and protection differed in each country due to the difference in laws, wherein protection was contained.[67] Those arguing for natural allegiance and therefore the extension of English rights to Scots were creating a 'monstrous' being with a natural head atop a political body – or a single head atop two bodies, one Scottish and one English.[68]

Ellesmere separately published his speech in the judgement chamber. Although he substantially agreed with Coke, Ellesmere took the time to emphasize why allegiance should be owed to the natural not political capacity of the king, or to the state. He argued that parliamentary opposition to naturalization had 'by subtile distinctions straine[d] our wittes to frame severall allegeances'.[69] To distinguish between the king and the kingdom 'was never taught, but either by traitors'; he noted its use by the Despensers, papists and Scottish 'puritans'.[70] Ellesmere argued that the idea of owing allegiance to the political body of the king meant that 'kinges have their authority by the positive Lawe of Nations, and have no more power, than the People hath, of whome they take their temporal jurisdiction'.[71] Ellesmere's concerns about this separation would be borne out in some of the uses – and abuses – of *Calvin's Case* in the 1640s and 1680s.

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In the context of debates over subjects' capacity to resist their monarch in the 1640s, it might be suspected, as Dudley Digges argued in 1643, that compelling arguments would rely on appeals to 'native liberty' that would allow the people to resume their 'originall power' if they do not like the 'civill constitutions, which were agreed upon for their good'.[72] Certainly, those arguing for non-resistance had *Calvin's Case* and natural allegiance on their side. Digges was justified in arguing that although in England the monarch was *sub lege*, if they chose not to obey the law, they are not 'compellible by strong hand', as there is no 'superiour jurisdiction'.[73] Digges made his argument relying on authorities such as 'Stawnford, Dyer, Crompton, and Sir Edward Coke' as well as Bracton, on whom he substantially relied.[74] However, the ambiguity of Coke's account of *Calvin's Case* left significant room to manoeuvre for the writers that sought to prove that 'duplex and reciprocal' allegiance left the subject-specific remedies in the failure of protection by the monarch to whom they owed 'natural' allegiance.

[63] T.N.A., SP 14/34, fol. 12v.
[64] T.N.A., SP 14/34, fol. 18v.
[65] T.N.A., SP 14/34, fol. 13r.
[66] T.N.A., SP 14/34, fol. 16v.
[67] T.N.A., SP 14/34, fols. 16v–17r.
[68] T.N.A., SP 14/34, fol. 17v.
[69] Egerton, 'The speech of the Lord Chancellor of England', p. 205.
[70] Egerton, 'The speech of the Lord Chancellor', p. 245.
[71] Egerton, 'The speech of the Lord Chancellor', p. 245.
[72] Dudley Diggs, *The Vnlavvfulnesse of Subjects Taking Up Armes Against Their Soveraigne in What Case Soever Together With an Answer to All Objections Scattered in Their Severall Bookes* (Oxford, 1643), p. 1.
[73] Diggs, *The Vnlavvfulnesse of Subjects Taking Up Armes*, p. 77.
[74] Diggs, *The Vnlavvfulnesse of Subjects Taking Up Armes*, p. 74.

Surprisingly, for the most part, they were able to do so within the (broad) parameters of existing law, although many of their interpretations were novel, to say the least.

Philip Hunton's *Treatise of Monarchy* did not directly cite Coke's *Report* but did substantially deal with its arguments. Hunton argued that the English monarchy was 'radically' limited by common law through its mixed constitution, which in turn limited allegiance.[75] He agreed with Coke that the coronation oath did not constitute a contract, but turned this on its head to argue that the monarch was subject to 'the Lawes of the Monarchy before he actually renewes the bond by any Personall Oath'.[76] Coke in his *Report* had spent significant time analysing the use of 'liege' in statute law, arguing this signalled a relationship of 'natural allegiance' that was then reflected in the written law. Hunton again reversed this finding, arguing 'what doe these names argue, but that his Soveraignty and our subjection is legall that is, restrained by Law?'[77] Most analyses of this text have dealt with Hunton's text as a response to Henry Ferne, specifically Hunton's complex formulae for understanding when and how a people may legitimately resist a king.[78] What is missed is that although Hunton struggled to find a morally or legally appropriate form of resistance, he did significantly reconfigure the allegiance of the individual and its relation to protection. If allegiance was in fact constituted by the law, rather than 'natural', then the rights-bearing subject theoretically had recourse if the monarch failed to protect their rights. This made explicit the suggestions in earlier common law texts of a contractual form of allegiance while avoiding the need to rely on the coronation oath. The author of *Knovvne Lavves*, a relatively straightforward critique of Royalist arguments of lawfulness, agreed that under common law 'the Lawes are the bounds of the Kings power and command; and of the Subjects Allegeance and Obedience'.[79]

William Prynne's *Sovereign Power* also tackled *Calvin's Case* directly in a wide-ranging, sometimes inconsistent argument.[80] Prynne framed the history of England as one of the people struggling to hold the monarch to their coronation oath. However, his interpretation of the oath was often contradictory, depending on what point he wished to make. For example, although the oath bound the king to 'grant, fulfill and defend ALL RIGHT FULL LAWES and CUSTOMES the which THE COMMONS OF THE REALME SHALL CHUSE',[81] he also used Coke's negation of the oath as a contract to state that royal assent 'is in truth but a formall Ceremony or complement (much like a Kings Coronation)'.[82] More strikingly, he used the nullity of the oath to argue that if the coronation is in fact a 'meer arbitrary humane Ceremony', it does not ensure the immunity of the king, 'much lesse an absolute exemption from all actuall resistance in cases of unjust invasions on their Subjects'.[83] Like Hunton, Prynne argued that the king was under the law regardless of the oath, which imposed 'no new but onely ratifie the old conditions in separably annexed to the Crown by the Common Law'.[84]

Prynne argued, from Coke's analysis of allegiance as 'duplex and reciprocal', that if Royalists could plead that those on the parliamentary side had forfeited royal protection, the 'bond and stipulation being mutuall', kings fighting their subjects cease to be kings in law and their 'Subjects alleagiance thereby is as to this discharged'.[85] He situated the right of resistance in parliament through a novel approach to the elements of *Calvin's Case* that dealt with the separation of the king's natural and

[75] Philip Hunton, *A Treatise of Monarchie, Containing Two Parts: 1. Concerning Monarchy in Generall. 2. Concerning this Particular Monarchy* (London, 1643), pp. 31–2.
[76] Hunton, *A Treatise of Monarchie*, p. 37.
[77] Hunton, *A Treatise of Monarchie*, p. 32.
[78] J. Sanderson, 'Philip Hunton's 'appeasement': moderation and extremism in the English civil war', *History of Political Thought*, iii (1982), 447–61; See also Tuck, *Philosophy and Government*, p. 235; M. M. Kundmueller, 'Keeping it complex with Philip Hunton, John Locke, and the United States Federal Judiciary: on the merit of murkiness in separation of powers jurisprudence', *British Journal of American Legal Studies*, xii (2023), 51–78.
[79] Anon., *Knovvne Lavves a Short Examination of the Counsells and Actions of Those That Have Withdrawne the King From the Governement and Protection of His People* (London, 1643), p. 2.
[80] W. M. Lamont, *Marginal Prynn: 1600–1669* (London, 1963), pp. 85–8, 100–4, 112–3; J. Greenberg and C. Comstock Weston, *Subjects and Sovereigns: The Grand Controversy Over Legal Sovereignty in Stuart England* (Cambridge, 2003), pp. 61–6; J. Greenberg, *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern Political Thought* (Cambridge, 2001), pp. 215–22.
[81] William Prynne, *The Soveraigne Povver of Parliaments and Kingdomes Divided Into Foure Parts* (London, 1643), fol. Gv. p. 49.
[82] Prynne, *The Soveraigne Povver of Parliaments,* fol. L2v., p. 83.
[83] Prynne, *The Soveraigne Povver of Parliaments*, fol. Mm3v., p. 93.
[84] Prynne, *The Soveraigne Povver of Parliaments*, fol. sig.H1r., p. 58.
[85] Prynne, *The Soveraigne Povver of Parliaments*, fol. Bv., p. 9.

political bodies. The appointment of officials had been 'anciently the Subjects right' though latterly usurped by the monarch. Where such officials infringed subjects' rights, parliament should act.[86] Coke had used the condemnation of the Despensers' rebellion on the grounds they were acting against the king's natural body to prove the indivisibility of the king's natural and political bodies. Prynne used – and misconstrued – this to prove the unlawfulness lay in deposing Edward II as private people: it was, however, 'lawfull for the whole State in Parliament'.[87]

Several other authors engaged with the idea of the monarch's power being 'entrusted' and its implications for rights, belonging and participation, returning to a contractual vision of allegiance. One anonymous author argued that power was granted to William at the conquest conditionally, 'for the prevention of blood shed and destruction' in return for ruling according to established laws: 'upon this condition [upholding the law] they [subjects] Sweare Obedience unto him'.[88] This enabled conditional allegiance: 'the people are bound to keep the Kings commandement, when he walks according to this rule'.[89] The anonymous author of *Maximes Unfolded*[90] argued that 'Legiance holds the King to his people by Oath and Office' and is constituted by law, as opposed to 'faith'.[91] This author emphasized the contractual nature of the coronation oath, arguing that the acclamation of the people at the coronation showed that explicit consent was necessary to activate allegiance.[92] Despite this focus on the oath, the author did use Coke separating the king's political and natural capacity to argue that (parliamentary) armed resistance was legitimate through '7. Rep. Calvins Case, the King is a body politick, lest there should be an interregnum; for that a body politick never dieth'. The author neglected, however, the judgement's emphasis that this was inseparable from the monarch's natural capacity.[93]

Robert Austin, a Church of England clergyman,[94] attempted to apply these natural law approaches specifically to *Calvin's Case* when arguing that the judgement did not delegitimate resistance. Austin carefully set out a summary of the case,[95] agreeing, against many of the authors above, that allegiance is natural; however, Austin then counterposed natural allegiance with the notion of *salus populi*. If allegiance is natural, then it should be undertaken with regard to this specific maxim; therefore, if the king acts against the welfare of the people, allegiance itself mandates the people act against the king.[96] Moreover, although the king has an indivisible natural and political capacity, so must the people; their political capacity is in fact their 'liberties and privileges'.[97] The encroachment of the king's natural capacity on the political capacity of the people was 'fatall to the Common-wealth'.[98]

These arguments show how the citizenlike status of the subject was an important facet of the wider justification of resistance. The fact that the case was used so frequently is in itself suggestive of both the importance of allegiance to debates about resistance and the centrality of *Calvin's Case* to notions of allegiance, protection and their interaction. The next time the case would come to the fore – in the

[86] Prynne, *The Soveraigne Povver of Parliaments*, fol. F2v., p. 43. See also D. A. Orr, *Treason and the State: Law, Politics and Ideology in the English Civil War* (Cambridge, 2002), pp. 48–50, 57, 208–9; Greenberg and Weston, *Subjects and Sovereigns*, pp. 53–4; D. Como, *Radical Parliamentarians and the English Civil War* (Oxford, 2018), pp. 162–4.

[87] Prynne, *The Soveraigne Povver of Parliaments*, fol. F2rv., p. 44.

[88] [Well wisher to the Church of God, his King and countrey], *18 Nov. 1642. The Unlimited Prerogative of Kings Subverted. Or a Short Treatise Grounded Upon Scripture and Reason, to Prove That Kings Ought As WellA Others to Bee Accountable for Their Actions. By a Well Wisher to the Church of God, His King and Countrey and Dedicated to All Such as Love the Truth* (London, 1642), fol. B2v.

[89] *Unlimited Prerogative of Kings Subverted*, fol. A1r.

[90] There has been some disagreement about whether this pamphlet was written by Henry Parker: R. Zaller, 'Reviewed work(s): Henry Parker and the English civil war: the political thought of the public's "Privado" by Michael Mendle', *Albion: A Quarterly Journal Concerned with British Studies*, xxviii (1996), 482–3.

[91] Anon, *Maximes Unfolded Viz 1. The Election and Succession of the Kings of England are With the Consent of the People. 2. The Royall and Politique Power of Our Kingdome in all Causes and Over all Persons is Properly in the Parliament. 3. The Oath of Supremacie Bindes No Mans Conscience to the King Against the Parliament, But the Pope. 4. An Answer to the Answerer of the Observatour, Concerning the Efficient, Matter, Forme and End of Government* (London, 1643), p. 8.

[92] Anon, *Maximes Unfolded*, pp. 29–30.

[93] Anon, *Maximes Unfoldedz*, pp. 46–7.

[94] A. H. Bullen and A. McConnell, 'Austin, Robert (bap. 1593, d. 1661), Church of England clergyman and political pamphleteer' *Oxford Dictionary of National Biography* (3 January 2008) <https://doi.org/10.1093/ref:odnb/912>.

[95] Robert Austin, *Allegiance Not Impeached: Viz, by the Parliaments Taking Up of Arms* (London, 1644), pp. 1–4.

[96] Austin, *Allegiance Not Impeached*, pp. 8–10, 12.

[97] Austin, *Allegiance Not Impeached*, p. 11.

[98] Austin, *Allegiance Not Impeached*, p. 12. E. Vallance, *Revolutionary England and the National Covenant: State Oaths, Protestantism and the Political Nation, 1553–1682* (Woodbridge, 2005), p. 72.

1680s – would see a change of focus to meet the different needs of the citizenlike English subject in negotiating their relationship to the state. At the same time, the reinterpretations of allegiance and protection in the 1640s would influence the ways writers in the 1680s engaged with *Calvin's Case*.

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In the 1680s, *Calvin's Case* was used first in relation to the perceived invasion of subjects' rights under James II, and then, after the accession of William and Mary, the possibility or impossibility of transferring allegiance to another monarch. The ruling in *Godden v. Hales* (1686) prompted one of the first major reconsiderations of *Calvin's Case*.[99] Sir Edward Hales had converted to Catholicism in 1685, shortly thereafter receiving command of a regiment, without being subject to the provisions of the Test Act. The case – like *Calvin's Case* – appears to have been a collusive action, to secure judicial sanction for Hales' position. Hales was convicted at Rochester Assizes in 1686 but appealed on the basis that he held Letters Patent from James II absolving him of the Act's restrictions. This case engaged with the reach of prerogative but Edward Herbert, chief justice of the king's bench also used *Calvin's Case* when he found in Hales' favour, stating that it was not lawful to 'bar the King of the Service of his Subject, which the Law of Nature did give unto him'.[100] This conclusion suggests the kind of expansive allegiance asserted by proponents of Scottish naturalization in 1608. William Atwood, a lawyer and political writer, critiquing the case, straightforwardly dismissed Coke's account of natural allegiance, stating the report was plagued by 'Fictions and loose Reasonings'.[101] Atwood looked back to the parliamentary debates around naturalization that had preceded *Calvin's Case*, arguing that in the face of opposition articulating a more circumscribed form of allegiance one 'may easily see how inexcusable the Judges of that time were, to proceed to the Judgment in Calvin's Case, after they had been so enlightned'.[102] Atwood argued that if allegiance was so large that a subject might break the law at the king's command, it would 'make a mad World'.[103]

The 1688 pamphlet dispute between Sir John Northleigh, a Tory pamphleteer and Gilbert Burnet, a clergyman who had been naturalized in the Netherlands after falling out of favour with James II broke new ground in discussing whether allegiance could legitimately be transferred.[104] Northleigh rebuked Burnet for writing pamphlets critical of James and his government for having been naturalized in the Netherlands. Northleigh argued, using *Calvin's Case*, that an individual should not 'attempt to instil distrustful Apprehensions of the Promises of your PRINCE' when his 'Allegiance, if we believe him, is tranferr'd to another abroad'.[105] Burnet viewed his naturalization as a lawful act that transferred his allegiance from James to the Low Countries authorities, dissolving his previous allegiance,[106] a view of allegiance that suggests it is not natural but a choice that an individual can make to ensure their own protection. Burnet stated he was naturalized 'when a Marriage and a settlement in Holland, made it necessary for me to desire the Rights and Priviledges of the Countrey'.[107] Burnet did not engage with *Calvin's Case*; Northleigh, however, relied on it, arguing in a response to Burnet that lawful naturalization was impossible: '*Calvin's Case* which my Lord Coke has so largely reported, has carried Allegiance to that pitch, that I think it is not so easily translated'.[108]

[99] See S. Pincus, *1688: The First Modern Revolution* (New Haven, Conn., 2009), pp. 154–5, 172, 180–217; C. A. Edie, 'Revolution and the rule of law: the end of the dispensing power, 1689', *Eighteenth-Century Studies*, x (1977), 434–50, at pp. 444–5; D. Dixon 'Godden v Hales revisited - James II and the dispensing power', *The Journal of Legal History*, xxvii (2006), 129–52, at pp. 141–2; H. Nenner, 'Loyalty and the law: the meaning of trust and the right of resistance in seventeenth-century England' *Journal of British Studies*, xlviii (2009), 859–70.

[100] Edward Herbert, *A Short Account of the Authorities in Law Upon Which Judgement Was Given in Sir Edw. Hales His Case Written by Sir Edw. Herbert... in Vindication of Himself* (London, 1688), pp. 15–16.

[101] William Atwood, *The Lord Chief Justice Herbert's Account Examin'd by W.A., Barrister at Law,...; Wherein it is Shewn That Those Authorities in Law, Whereby He Would Excuse His Judgment in Sir Edward Hales His Case, are Very Unfairly Cited and As Ill Applied* (London, 1689), p. 68.

[102] Atwood, *The Lord Chief Justice Herbert's Account Examin'd*, p. 68.

[103] Atwood, *The Lord Chief Justice Herbert's Account Examin'd*, p. 27.

[104] M. Knights, *Representation and Misrepresentation in Later Stuart Britain: Partisanship and Political Culture* (Oxford, 2005), p. 351.

[105] John Northleigh, *Parliamentum Pacificum, Or, the Happy Union of King & People in An Healing Parliament Heartily Wish't For, and Humbly Recommended/by a True Protestant and No Dissenter* (London, 1688), p. 49.

[106] G. Burnet, *Bishop Burnet's History of His Own Time: Volume II* (London, 1840), pp. 461–2.

[107] Gilbert Burnet, *Dr. Burnets Vindication of Himself From the Calumnies With Which He is Aspersed in a Pamphlet Entitled Parliamentum Pacificum Licensed by the Earl of Sunderland and Printed at London in March 1688* (Amsterdam, 1688), p. 3.

[108] John Northleigh, *Natural Allegiance, and a National Protection, Truly Stated, Being a Full Answer to Dr. G. Burnett's Vindication of Himself* (London, 1688), p. 45.

The positions taken by Burnet and Northleigh would be important in the prolonged debates around the requirement under the 1688 Oaths of Allegiance and Supremacy Act for office-holders to take new oaths to William and Mary.[109] Although *Calvin's Case* had established that oath-taking in itself did not constitute allegiance, the act of 'translating' allegiance through an oath was the central problem around which authors organized their thinking.

It is notable that many of those advocating for taking the oath did not deal specifically with *Calvin's Case*, but, like Burnet, outlined new visions of allegiance and protection that ignored the concept of natural allegiance and the obligations it may place on the subject. Atwood argued that 'an Agreement between a King, with the Lords, and a full Representative of the Commons of England, will bid fairer for being according to the Original Constitution of our Government'.[110] In this case, the act of constituting government overrode any natural allegiance based on heredity. Atwood argued for a 'rightful Power lodg'd' in the people, exercised by giving the crown to William and Mary.[111] Therefore, they have a choice in exercising their allegiance, if it was accepted that 'there may be a Civil, as well as Natural Death of a King'.[112] Nonetheless, a law was important; it was needed to effect the transfer of allegiance to 'a Successor legal by the Constitution of the Government',[113] justifiable on the grounds that a king had treated his people badly, sought their destruction, or alienated his own kingdom. Atwood sought authorities for this argument in history and re-emphasized the coronation oath as a contract.

Atwood noted that 'The great Unhappiness of this Nation is, that Divines not only set up for the greatest States-Men, but will pretend to be the best Lawyers and Casuists'[114]; clergymen were at the forefront of debates about the new oath, as opponents and proponents. Those arguing against taking the oath used *Calvin's Case* to show the impossibility of individuals lawfully transferring allegiance, in much the same way that Northleigh had argued against Burnet. Jeremy Collier, a non-juring clergyman, noted that Coke had stated that allegiance was due to the law of nature. Natural law conferred an 'immutable obligation', incorporated 'into our English Constitution' that meant English subjects could not be released from natural allegiance. In contrast to this lawful obligation, William had 'but meer Power to prove his Authority'; those taking the oath 'are pleased to ratify their Slavery'.[115] It is important to note that in Collier's argument, natural allegiance did not necessarily confer only natural protection: rather, it conferred a lawful form of protection in the face of 'meer Power'. Theophilus Downes, another non-juring clergyman, also privileged subjects' rights-bearing status. Downes asked whether it was possible to swear the oath to William and Mary as a kind of temporary obedience, without committing to transferring natural allegiance and concluded that to do so was impossible under English law. If allegiance is mutual and reciprocal, the 'different degres of Allegiance must be determin'd by the different degrees of subjection: and therefore a Natural Subject, who enjoys all the Liberties, and Priviledges of the Kingdom, and owes the highest degree of subjection'.[116] Downes rejected the interpretations of the 1640s that had argued for legally limited allegiance, noting that Coke's legal allegiance did not mean an allegiance 'circumscribed by Law; but it is therefore so called, because the Law requires it of every Subject upon Oath, and has prescribed the Form and manner of it'.[117]

Those clergymen arguing in favour of the oath had to again reinterpret *Calvin's Case*. Daniel Whitby agreed with the fundamentals of Coke's *Report*, including that allegiance was due to the natural capacity of the king and inseparable from his political capacity. However, although the monarch can never cease to be king in the natural sense, it is possible that the monarch can separate from their political capacity if, for example, they leave the country, therefore severing 'that politick Capacity which was

[109] Pincus, *1688: The First Modern Revolution*, pp. 294–6; Condren, *Argument and Authority in Early Modern England*, pp. 318–20, 326–28, 330–42. Greenberg, *The Radical Face of the Ancient Constitution*, pp. 272–3, 278–81; J. Hoppit, *A Land of Liberty? England 1689-1727* (Oxford, 2002), pp. 21–3, 33–6; D. M. Jones, *Conscience and Allegiance in Seventeenth Century England*, pp. 201–22.

[110] William Atwood, *The Fundamental Constitution of the English Government Proving King William and Queen Mary Our Lawful and Rightful King and Queen* (London, 1690), p. xxii.

[111] Atwood, *The Fundamental Constitution of the English Government*, fol. A2r.

[112] Atwood, *The Fundamental Constitution of the English Government*, p. vii.

[113] Atwood, *The Fundamental Constitution of the English Government*, p. xxvi.

[114] Atwood, *The Fundamental Constitution of the English Government*, fol. A2r.

[115] Jeremy Collier, *Animadversions Upon the Modern Explanation of II Hen. 7. Cap. I, or, A King de Facto* (London, 1689), pp. 1–2.

[116] Theophilus Downes, *A Discourse Concerning the Signification of Allegiance, as it is to be Understood in the New Oath of Allegiance* (London, 1689), pp. 7–8.

[117] Downes, *A Discourse Concerning the Signification of Allegiance*, p. 13.

before apropriated to his natural Person by the Law'.[118] Whitby used *Calvin's Case* to reconfigure the relationship between protection and allegiance along the same lines as Burnet, privileging the benefits of protection over the duties of allegiance: the 'duplex and reciprocal nature' of this relationship meant 'my natural Allegiance must cease to be actually due to him who cannot govern and protect me, and must be due to him who actually doth so'.[119]

William Sherlock took the oath after months of public prevarication: he argued that understanding kingship as a legal right profoundly misunderstood the true grounds of kingship, and therefore allegiance, which is due 'not to bare Legal Right but to the Authority of God'.[120] It was unlawful for a people to depose a monarch; however, a monarch can only ascend the throne due to God's providence, so 'when God transfers Kingdoms and requires our Obedience and Allegiance to a new King, he necessarily transfers our Allegiance too', admitting that 'This Scheme of Government may startle some men'.[121] Sherlock argued that it was possible to discern if a monarch, such as William, had been placed on the throne by God, by judging the extent to which their government was 'settled', that is, if their opponents were crushed, parliament had submitted and so on.

Many responses seem frustrated by the loopholes that Sherlock had created. Collier argued that Sherlock, possibly inadvertently, had stated that the deposition of James was legitimate.[122] Collier argued that *Calvin's Case* shows this is not possible: the judgement 'forecloses all Objections against Rigour and Maleadministration'.[123] An anonymous author also found significant fault with Sherlock. Like Collier, they drew on Coke's *Report*, in this case arguing that allegiance was still due to James II, given that allegiance is perpetual and due to the natural body of the king.[124] Theophilus Downes too attacked Sherlock, also emphasizing the finding in *Calvin's Case* that allegiance follows the natural body of the monarch.[125] He argued that the 'settled' nature of government was no proof of legitimacy, given that it could equally apply to Cromwell. Natural and legal allegiance both oblige the subject to bear allegiance to the king '[as the Lord Coke expounds it] until the letting out of the last drop of our dearest Heart Blood'.[126] John Kettlewell, another non-juring clergyman, also used Coke to argue, against Sherlock, that it was possible to be in allegiance to a monarch who could not offer protection; in fact, linking protection too closely to allegiance undermined allegiance itself, leading to 'one Obedience to a King in his good Days, and another in his bad ones'.[127]

A final anonymous contributor to the debate challenged Sherlock from the perspective of the newer thinking on allegiance and protection. They argued it was nonsense to argue a duty of allegiance adheres more to an individual due to hereditary succession than to one in possession of the throne 'with the free submission of the People, by their Representatives assembled in a Parliamentary way'.[128] The author specified that they were against the 'mischievous Position of separating the Person and Office', noting its condemnation in *Calvin's Case*.[129] However, where the king has been fully divested of their office, allegiance is clearly no longer due. Moreover, *Calvin's Case* itself was no reliable authority:

> It is not worth the while to argue any thing from Calvin's Case, the Authority of which can never be of advantage to either side, because there is scarce any one Proposition (unless it be the very point

[118] Daniel Whitby, *Considerations Humbly Offered for Taking the Oath of Allegiance to King William and Queen Mary* (London, 1689), p. 9.
[119] Whitby, *Considerations Humbly Offered*, pp. 11, 24.
[120] William Sherlock, *The Case of the Allegiance Due to Soveraign Powers Stated and Resolved* (London, 1691), p. 2.
[121] Sherlock, *The Case of the Allegiance*, pp. 2–3.
[122] Jeremy Collier, *Dr. Sherlock's Case of Allegiance Considered With Some Remarks Upon His Vindication* (London, 1691), pp. 96–7.
[123] Collier, *Dr. Sherlock's Case of Allegiance*, pp. 96–8.
[124] Anon., *A Review of Dr. Sherlock's Case of Allegience Due to Sovereign Powers, &c. With an Answer to His Vindication of That Case* (London, 1691), pp. 36–7.
[125] Theophilus Downes, *An Examination of the Arguments Drawn From Scripture and Reason, in Dr. Sherlock's Case of Allegiance, and His Vindication of it* (London, 1691), pp. 25–7.
[126] Downes, *An Examination of the Arguments*, p. 72.
[127] John Kettlewell, *The Duty of Allegiance Settled Upon Its True Grounds, According to Scripture, Reason, and the Opinion of the Church in Answer to a Late Book of Dr. William Sherlock* (London, 1691), pp. 36–7.
[128] Anon., *Reflections Upon Two Books, the One Entituled, the Case of Allegiance to a King in Possession the Other, An Answer to Dr. Sherlock's Case of Allegiance to Sovereign Powers* (London, 1691), pp. 7–8.
[129] Anon., *Reflections Upon Two Books*, p. 52.

> adjudged) advanced through that whole Case, as 'tis reported by my Lord Coke, but what may be answered (that is, contradicted) by something else of the same Author in the same Case.[130]

In the eighty years since the promulgation of the judgement in *Calvin's Case* – and, more specifically, Coke's account of the judgement – English subjects had to reconsider and practically reorient their relationship to their sovereign more than once. Coke's account had innovated in attempting to graft natural allegiance onto a rights-bearing, citizenlike status. In the ambiguities that remained in his account, he had left space for assertions of a citizenlike status that enabled resistance in the 1640s, albeit through the articulation of a right to remedy that had previously been unvoiced. By 1691, the ambiguities of Coke's account had come to be seen, at least by some, not as a balancing act between protection and allegiance, allowing subjects to assert legally guaranteed rights in the context of natural allegiance, but as rendering the judgement not fit for purpose. Allegiance and protection had transitioned from an inescapable duty imposed on subjects that conferred benefits; rather a significant number of thinkers instead understood allegiance as something adhering to subjects that should be offered only in return for the best forms of protection. This thinking, however, still had to contend with the compelling legal arguments that could be drawn from *Calvin's Case,* arguments which still influence definitions of British citizenship today.

[130] Anon., *Reflections Upon Two Books*, pp. 58–9.